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Commenter: WorldCom, Inc.
Applicant: BellSouth
State: South Carolina
Date: October 20, 1997

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Application by BellSouth	)	
Corporation et al. for Provision of	)	CC Docket No. 97-208
In-Region, InterLATA Services in	)	
South Carolina	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF WORLDCOM, INC., IN OPPOSITION TO BELLSOUTH APPLICATION FOR INTERLATA AUTHORITY IN SOUTH CAROLINA

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Dated: October 20, 1997

Commenter: WorldCom, Inc.
Applicant: BellSouth
State: South Carolina
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EXECUTIVE SUMMARY

In its Michigan and Oklahoma orders, the Commission established a detailed roadmap for section 271 applications. BellSouth's application fails to comply with this roadmap; indeed, with respect to key elements of its application, BellSouth not only disagrees with the Commission's requirements, but deliberately refuses to comply. The application should be denied. The Commission should not deviate from the section 271 roadmap that it has so recently, and so carefully, laid out.

Initially, the application fails to comply with the requirements for Track B, as explained in the Oklahoma Order, because, based on current information, there is a pending interconnection request from a facilities-based carrier which can reasonably be expected to lead to residential service.

Under either Track, the application must be denied because BellSouth has not complied with the competitive checklist.

First, BellSouth has submitted inadequate data to support its claim of nondiscriminatory access to OSS. The data does not comply with the requirements the Commission established in Ameritech Michigan. The inadequacy of BellSouth's data is particularly significant in light of BellSouth's record of inadequate provision of OSS in its dealings with WorldCom.

Second, BellSouth is refusing to pay reciprocal compensation for transport and termination of local calls to CLEC telephone exchange customers who just happen to be information service providers. That refusal violates the competitive checklist, as well as BellSouth's voluntarily negotiated interconnection agreement with WorldCom.

Third, the South Carolina Public Service Commission has authorized BellSouth to require wholesale rates for unbundled network elements which the CLEC can combine to provide a retail service. That violates the basic requirement of the checklist to make unbundled elements available at cost-based rates.

Finally, the public interest requires denial of the application. Once BellSouth obtains interLATA authority, it will be an easy matter for it to offer its existing local exchange customers a full service package including long distance. By contrast, local exchange competitors in South Carolina face a long and uncertain road before they can offer full service packages, including local service. The Commission's goal should be to ensure that changing local carriers will be as easy as changing long distance providers. Until that happens -- and South Carolina is very far from that goal -- allowing BellSouth into the long distance market would create a lopsided market, depriving consumers of any real competitive choice.

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WorldCom, Inc. hereby submits its comments on the Section 271 application for in-region interLATA authority filed by BellSouth Corporation et al. ("BellSouth") on September 30, 1997.

INTRODUCTION

WorldCom, Inc. ("WorldCom") is a diversified telecommunications company with operations throughout the world. WorldCom, Inc. and its subsidiaries provide a full range of telecommunication services, including local, intrastate, interstate and international services. WorldCom is currently the fourth largest long distance carrier in the United States and is a leading provider of competitive local exchange service. WorldCom -- with its traditional long distance operations, its MFS subsidiary's competitive local exchange carrier ("CLEC") business, and its UUNet Internet service provider affiliate -- is uniquely positioned to take advantage of the opportunities presented by the 1996 Act to bring a wide range of choices for telecommunications

and information services to customers everywhere.

The ability of WorldCom and others to provide competing local exchange and full service offerings to all customers, especially residential customers and those in rural areas, depends largely on the success of the BOCs' implementation of the 1996 Act. In particular, WorldCom needs nondiscriminatory access to BellSouth's unbundled network elements, at cost-based rates, with the ability to combine those elements in any configuration with each other and with WorldCom's own facilities. WorldCom also needs the operational support systems ("OSS") that give it the practical, as well as the theoretical, ability to be a local service provider using BellSouth's network. As BellSouth's Section 271 application makes clear, however, the Commission is a long way from the point at which it can declare that the Act is fully implemented and the opportunities it provides for competitive entry into the local market are truly available.

Initially, the application is defective because it seeks authority under Track B. The information BellSouth itself presents shows that there is a pending application from a facilities-based carrier which can reasonably be expected to lead to residential service. Accordingly, BellSouth must proceed under Track A.

In any event, under either Track the application must be denied, because BellSouth has not shown compliance with the competitive checklist.

BellSouth's application relies on the OSS which it uses throughout its region. However, WorldCom's experience with those systems in other states in BellSouth's region has not been satisfactory. The data BellSouth presents, purporting to show that it has provided OSS to CLECs

in its region that is equivalent to the support it provides internally, is seriously flawed. The data does not comply with the requirements the Commission established in Ameritech Michigan; indeed, instead of complying with those requirements, BellSouth openly defies the decision and does not even purport to comply. On this basis alone, the application should be denied. In Ameritech Michigan the Commission carefully laid out a roadmap for section 271 applications. In an area where certainty is so important, the Commission should not now alter the rules.

In addition, BellSouth has adopted positions with respect to rates for combined network elements and payment of reciprocal compensation that are inconsistent with its obligations under the competitive checklist.

Finally, public interest factors dictate denial of the application. By relying on its regionwide performance to support the application, BellSouth clearly expects this application to be a precedent for obtaining Section 271 authority throughout its region. Once it obtains interLATA authority, it will be an easy matter for BellSouth to add long distance service to its local customers. It can take advantage of several competing nationwide interexchange networks and an automated primary interexchange carriers change process with the capability of switching long distance carriers for more than 30 million customers annually.[1] The local exchange market in South Carolina and the rest of BellSouth's region stands in stark contrast. The Commission's goal should be to ensure that changing local carriers will be as easy as changing long distance providers, and that consumers everywhere will have real choices of local and full-service

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[1] Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995) at ¶ 53.

providers.[2]

The danger of prematurely allowing BellSouth to provide in-region, interLATA service was explained vividly by Ameritech's Chief Executive Officer, who has been quoted as saying that

> The big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?[3]

The Commission must not take away that incentive until the job of opening the local exchange to full competition is done.

I. BELLSOUTH HAS FAILED TO DEMONSTRATE THAT ITS PROVISION OF OSS TO COMPETITIVE CARRIERS COMPLIES WITH THE COMPETITIVE CHECKLIST.

BellSouth's application must be denied on the ground that it has not demonstrated that its provision of OSS to competitive carriers is consistent with its checklist obligation to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). With respect to resale services, BellSouth has not shown that the access it offers is "equivalent to the access [BellSouth]

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[2] The FCC recognized the importance of this goal when it ordered incumbent LECs to switch a customer's local carrier as easily as its long distance carrier is switched today when the switch requires only a software change. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15711-12, ¶ 421 (1996) ("Local Competition Order"), modified on other grounds, Iowa Utilities Board v. F.C.C., 120 F.3d 753 (8th Cir. 1997).

[3] See "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," Washington Post, October 23, 1996 at C12.

provides to itself." Ameritech Michigan Order[4] ¶ 128. With respect to provisioning of unbundled loops and other network elements, it has not shown that its level of OSS support offers competitors "a meaningful opportunity to compete." Id. ¶ 141. Indeed, BellSouth nowhere states unequivocally that its OSS performance measurements meet the requirements in the Ameritech Michigan Order. Instead, BellSouth argues with the Commission about OSS performance measurements. BellSouth Brief at 20.

The Commission has stated that "the most probative evidence that OSS functions are operationally ready is actual commercial usage." Ameritech Michigan Order ¶ 138. The Commission "may consider carrier-to-carrier testing, independent third-party testing, and internal testing" where commercial usage is not available, but where commercial usage is available, it remains "the most probative evidence." Id.

In this case, there is little evidence of commercial usage in South Carolina. But BellSouth's OSS functions for South Carolina will be performed out of its offices in Atlanta and Birmingham, using the same systems and staff which it utilizes for OSS support in the rest of its region. Compliance Order[5] at 28. In this respect, this case is like Ameritech Michigan, where the Commission considered evidence from Illinois as well as Michigan (despite the fact that there

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[4] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137 (rel. August 19, 1997) ("Ameritech Michigan Order").

[5] Public Service Commission of South Carolina, Entry of BellSouth Telecommunications, Inc. into InterLATA Market, Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. 97-101-C (July 31, 1997) ("Compliance Order").

was a record of commercial usage in Michigan), because "Ameritech provides access to OSS functions on a regional basis from a single point of contact." Ameritech Michigan Order ¶ 156. For the same reason, BellSouth's actual performance in other states in its region -- where there has been actual commercial usage -- is the "most probative evidence" concerning BellSouth's OSS performance overall.

In Ameritech Michigan, the Commission stressed the critical importance of data on "average installation intervals" in comparing the RBOC's performance with the performance provided to competing carriers in the ordering and provisioning of resale services. Ameritech Michigan Order ¶ 167. BellSouth's application purports to present comparative data on this issue for resale services. However, the data only shows what the interval is between BellSouth's issuance of a service order and the due date established, and how often the due date is met. See attached Declaration of Gary J. Ball ("Ball Decl.") at ¶¶ 24, 25. That fails to account for the interval between the competing carrier's request for service, and BellSouth's issuance of a service order. Id. Moreover, BellSouth's data for meeting due dates apply only to resale of POTS, which omits a significant segment of the competitive market demanding complex services. Ball Decl. ¶ 25.

BellSouth's data for ordering and provisioning unbundled loops are even worse. These data show only the percentage of due dates missed, giving no idea of how long it takes the CLECs to get a due date established, or what the average interval is between the CLECs' request and the due date. Ball Decl. ¶ 26. BellSouth states that it has "published a set of target intervals for provisioning UNEs." Stacy Performance Aff't ¶ 35, Exh. WNS-7. However, there is no

analysis of whether these targets offer CLECs a meaningful opportunity to compete, and no finding on this issue by the South Carolina Public Service Commission ("PSC"). Nor is there any record of whether BellSouth has met these "target intervals" in the past. Indeed, at this point BellSouth acknowledges that "insufficient historical data exists." Stacy Performance Aff't ¶ 35. In short, there are simply not sufficient facts in this record for the Commission to make a finding on BellSouth OSS performance with respect to the ordering and provisioning of unbundled network elements.

In addition, BellSouth's mechanized order generation systems have either not eliminated the need for manual intervention, or have been in operation so recently that there has not been enough time to evaluate their performance. Ball Decl. ¶¶ 5-9, 11-13. As the Commission recognized in Ameritech Michigan, a system requiring significant manual intervention is particularly unreliable as a basis for finding nondiscriminatory access. Ameritech Michigan Order ¶ 172. Even if there is no discrimination presently (which BellSouth's data do not show), as the number of orders increases, "more orders will be processed manually and, as a result, more orders will be backlogged, remain pending, or processed more slowly than [the incumbent's] own orders." Id.

BellSouth argues that problems occurring during the ordering stage are attributable to a high error rate on the part of the requesting carriers. Stacy OSS Aff't ¶ ¶ 111, 112. However, no data are presented to support that claim. Moreover, no data are presented to establish BellSouth's efforts to prevent such errors; nor has BellSouth presented data on the all-important issue of how quickly BellSouth personnel report the errors back to CLEC personnel attempting

to place an order, and how that interval compares to BellSouth's in-house error correction.

Finally, BellSouth argues that the existence of a significant need for manual intervention should not be a matter of concern, since the same manual systems are available to CLECs ordering services as are available in-house. Stacy OSS Aff't ¶ 69. However, as the Commission pointed out in Ameritech Michigan, manual systems are particularly susceptible to backlogs, as well as to informal preferential treatment for in-house personnel. Ameritech Michigan Order ¶ 172. The continued existence of significant manual intervention in BellSouth's OSS system stresses the necessity of adequate data on actual commercial usage, which is still lacking.

The deficiencies in BellSouth's data are particularly disturbing in light of BellSouth's past history of deficiencies in providing service to competing carriers. The attached Declaration of Gary Ball describes the continuing need to rely on ordering and pre-ordering systems requiring manual intervention. Ball Decl. ¶¶ 5-9, 11-13. It also relates numerous incidents involving cutovers, billing, outages and service conversions, in which BellSouth inadequacies created customer ill-will towards WorldCom. Ball Decl. ¶¶ 18-23. In light of this history, the Commission can only conclude that the inadequacies in BellSouth's performance data reflect real-world problems, which must be corrected before the Commission can find that the local exchange market in South Carolina is open to competition.

The inadequacy of BellSouth's data on OSS may well be explained by BellSouth's continued disagreement over the Commission's requirements for the data needed to support a section 271 application, as explained in the Ameritech Michigan Order. Indeed, BellSouth is quite candid about its disagreement with the Commission's decision in Ameritech Michigan, and

makes no claim that its performance data meet the standards of Ameritech Michigan. BellSouth Brief at 20; Stacy OSS Aff't ¶ 60. For example, BellSouth concedes that its application lacks comparative data on the average interval between receipt of an LSR and issuance of a service order in SOCS for itself and CLECs.[6] Yet the Commission required this data in the Ameritech Michigan Order (at ¶ 187). That is not just a technical omission, since, as we have described, the crucial period of delay -- the period where manual intervention frequently causes mistakes and delays -- is the period before BellSouth issues a service order.

Of course, BellSouth may preserve its rights and challenge the Commission's rulings in the courts. But unless the courts overturn the Commission's rulings, the Commission should adhere to the roadmap it established in Ameritech Michigan for section 271 applications. For the Commission to change the guidelines unnecessarily would only contribute additional confusion to a situation that demands certainty.

II. BELLSOUTH'S REFUSAL TO PAY RECIPROCAL COMPENSATION FOR LOCAL CALLS TO ISP PROVIDERS VIOLATES THE COMPETITIVE CHECKLIST.

Item (xiii) of the competitive checklist requires the RBOC to offer or provide "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. § 271(c)(2)(B)(xiii). BellSouth's application states that "BellSouth does not pay or bill local interconnection charges for traffic termination to enhanced service providers because this traffic is jurisdictionally interstate." BellSouth Brief at 52. BellSouth had

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[6] Affidavit of William N. Stacy, Performance Measures, ¶ 43 ("Provisioning Order Reject/Error Notice (not available at this time)"; "Provisioning Firm Order Confirmation (not available at this time)."

previously informed WorldCom's operating subsidiary in Georgia, by letters of August 12 and September 11, 1997, that it would not pay reciprocal compensation for transport and termination of local calls to CLEC telephone exchange customers who just happen to be information service providers ("ISPs"). Ball Decl. ¶ 15. This position violates item (xiii) of the checklist and is a sufficient basis, standing alone, for denying BellSouth's application.

In addition, entirely apart from the merit (or lack of merit) of its legal position, BellSouth's refusal to pay reciprocal compensation violates a voluntarily-negotiated interconnection agreement with WorldCom. BellSouth has assumed that it may cavalierly disregard a voluntarily-negotiated interconnection agreement whenever it changes its legal position. Observance of interconnection agreements is a fundamental assumption on which interLATA authority must be based. In BellSouth's case, such an assumption is shaky at best.

1. Section 251(b)(5) of the Act requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). It does not expressly limit this obligation or exclude any particular category of traffic. Section 251(g), however, requires continued enforcement of the existing access charge regime, which provides for an alternative system of compensation for the transport and termination of telecommunications carried by two or more carriers. 47 U.S.C. § 251(g). Reading the two sections in relation to each other, it is clear that the reciprocal compensation provision of Section 251(b) was intended to provide compensation for the transport and termination of traffic carried by two or more carriers, where compensation is not already addressed by access charges.

This is the same conclusion reached by the Commission in its Local Competition Order. The Commission explained that the existing regulatory regime, in which interstate and intrastate interexchange traffic was subject to access charges, was to be maintained pursuant to Section 251(g) of the Act.[7] Traffic not subject to access charges would be subject to reciprocal compensation obligations.[8] The simple logic drawn from the Act was that access charges and reciprocal compensation were intended to dovetail to cover all types of traffic carried by two or more carriers; such traffic was to be treated either through reciprocal compensation or access charges. No traffic was to incur both types of treatment. Thus, the Commission clearly established that, under the Act, the termination of traffic carried by two or more carriers not otherwise subject to access charges would be subject to reciprocal compensation. Since local calls to ISPs (whether or not they happen to be CLEC customers) are not subject to access charges, they are subject to reciprocal compensation.

2. There is presently pending before the Commission a proceeding in which the Association for Local Telecommunications Services ("ALTS") has requested a clarification of the Commission's rules regarding reciprocal compensation for information service provider traffic.[9] However, the Commission must reach the reciprocal compensation issue in this

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7 Local Competition Order, ¶ 1034.

8 Id., ¶¶ 1034-1035.

9 See Comments of WorldCom, Inc. filed July 17, 1997 in Association for Local Telecommunications Services, Request for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD Docket 97-30.

proceeding as well, unless it denies BellSouth's application on other grounds. Whenever the RBOC has determined not to pay reciprocal compensation for local calls to CLEC telephone exchange customers who happen to be ISPs, the Commission cannot approve the RBOC's section 271 application without first deciding whether the RBOC is complying with the competitive checklist, which includes the obligation to pay reciprocal compensation.

2. BellSouth argues that the Commission cannot review its legal position on the reciprocal compensation issue, because it is protected by the South Carolina PSC's finding that its reciprocal compensation arrangements are in full compliance with item (xiii) of the checklist. BellSouth Brief at 52. BellSouth argues that the PSC's conclusion is "definitive," because it falls within the PSC's jurisdiction to determine interconnection rates. Id.

However, BellSouth has mischaracterized the PSC's finding. All the PSC did was to determine that BellSouth was in compliance with item (xiii) of the checklist because its rates for reciprocal compensation are within the FCC proxy rates. Compliance Order at 52, referring to AT&T Arbitration Order[10] at 15. There is nothing in the PSC's Compliance Order or its AT&T Arbitration Order determining that BellSouth's rates for reciprocal compensation should not be applied to local calls to CLEC telephone exchange customers who happen to be ISPs. Specifically, there is nothing in either PSC decision finding that such local calls are not subject to the reciprocal compensation obligation. The PSC's finding that BellSouth's rates for reciprocal

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[10] Public Service Commission of South Carolina, Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Docket No. 96-358-C, Order on Arbitration (March 10, 1997) ("AT&T Arbitration Order").

compensation comply with the Act was not a finding that BellSouth was correct in refusing to pay those rates for such local calls.

Indeed, BellSouth did not announce its position on this issue until after the PSC's decisions were issued.[11] WorldCom has difficulty understanding how the PSC's finding can be taken as even an implicit endorsement of a position BellSouth did not announce until after the PSC decision was issued. BellSouth is claiming finality for a finding the PSC never made.

Moreover, even if the PSC had made such a finding, that would not relieve this Commission from its independent obligation to determine whether BellSouth's application complies with all the items on the checklist, including item (xiii). Where this Commission has jurisdiction conferred by Congress to make a specific determination, it is not bound by contrary determinations that State commissions may have made. Ameritech Michigan Order ¶ 285. Determinations made within a State agency's jurisdiction cannot operate to preclude this Commission from making determinations which Congress has specifically directed it to make. Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311, 324 (1981); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 580-82 (1981); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

3. In addition to compliance with the checklist, BellSouth's position on reciprocal

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[11] The PSC's Compliance Order was issued July 31, 1997, and its AT&T Arbitration Order (which the Compliance Order relied on with regard to reciprocal compensation rates) was issued March 10, 1997. While various WorldCom subsidiaries received notices from other RBOCs (NYNEX, Bell Atlantic, Southwestern Bell and Ameritech) over a period from April 16 to July 3, 1997, announcing their refusal to pay reciprocal compensation for ISP calls, BellSouth first announced its position on August 12, 1997, in a letter addressed to all competitive carriers. Ball Decl. ¶ 15.

compensation also has major implications with respect to the public interest issue under section 271. The effect of BellSouth's position is to place information service providers off-limits for competitive carriers, since they would receive no compensation for the vast majority of incoming calls which come from customers of the incumbent LEC. As pointed out in the attached Declaration of Gary Ball, BellSouth is now offering its own Internet access service to consumers. Ball Decl. ¶ 16. The result is to place the ISPs in the hands of a monopoly provider of telephone service, while that provider is also competing with them directly for ISP business. Id. This result is totally at variance with the public interest in a competitive market for Internet access.

In addition, as the Ball Declaration points out, BellSouth's newly-adopted legal position is at variance with its obligations under its interconnection agreement with WorldCom's operating subsidiary in Georgia, which requires reciprocal compensation for "Local Traffic" with no exclusions based upon the identity or the characteristics of the Telephone Exchange Service end user receiving the call. Ball Decl. ¶ 16. We are confident that the Georgia Public Service Commission, in the proceeding recently commenced by WorldCom's subsidiary, will require BellSouth to comply with its agreement. Id. However, BellSouth's assumption that whenever it changes its legal position, it can brazenly disregard its existing interconnection agreements, undermines the many points at which it is asking the Commission to approve its application on the basis of commitments it has made as to future conduct, rather than on the basis of demonstrated past performance. Indeed, BellSouth's conduct undermines the fundamental assumption of Section 271 that the RBOC will comply with interconnection agreements it has entered into -- even if its legal position on a particular position may change. BellSouth's

conduct reinforces the Commission's admonition that "[p]aper promises of future nondiscrimination are not sufficient." Ameritech Michigan Order ¶ 269.

III. BELLSOUTH'S FAILURE TO OFFER COST-BASED RATES FOR NETWORK ELEMENTS COMBINED BY THE CLEC TO PROVIDE A RETAIL SERVICE VIOLATES THE COMPETITIVE CHECKLIST.

1. Item (ii) of the competitive checklist requires the RBOC to offer or provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). One of the most important aspects of Section 251(c)(3) of the 1996 Act is the right it gives requesting carriers to utilize combined network elements as a "platform" to provide any service. Specifically, Section 251(c)(3) gives "any requesting telecommunications carrier" the right to obtain unbundled network elements and requires incumbent ILECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." The FCC's implementing rules confirm that ILECs must allow requesting carriers to combine network elements "in order to provide a telecommunications service." 47 C.F.R. § 51.315(a).

BellSouth's SGAT purports to comply with the FCC's rules by stating that the CLECs may combine network elements to provide telecommunications services. SGAT § II.F. However, the SGAT also incorporates the rates ordered in the AT&T arbitration. Compliance Order at 53. And the PSC's order in the AT&T arbitration provides that if the CLEC combines network elements to produce an existing retail service, it "should be required to pay to BellSouth the applicable wholesale rate of the replicated service and not just the rates for the unbundled

network elements that are purchased." AT&T Arbitration Order at 11.

The PSC's decision plainly violates the Act. Section 252(d)(1) gives the CLECs the right to obtain unbundled network elements at cost-based rates, and section 251(c)(3) gives them the right to combine such elements to provide telecommunications services. The CLECs cannot be deprived of their right to cost-based rates because they choose to exercise their right to combine. So long as its SGAT does not explicitly disavow the PSC's decision and offer cost-based rates for CLEC-combined network elements, the Commission cannot find that BellSouth has complied with item (ii) of the checklist.

The Eighth Circuit upheld the Commission's rule allowing requesting carriers to offer telecommunications services through a combination of network elements, specifically rejecting the argument that the rule would nullify the wholesale rate by allowing carriers to obtain the equivalent of wholesale service at the less expensive cost-based rate. Iowa Utilities Board v. F.C.C., 120 F.3d 753, 813-15 (8th Cir. 1997). The Eighth Circuit pointed out that there was ample economic as well as legal justification for differentiating the resale of telecommunications services from the sale of telecommunications services based on unbundled elements. 120 F.3d at 814-15. In addition, as the Commission has pointed out, competitive carriers who provide service by purchasing network elements rather than by resale have an ability to offer consumers innovative services that the incumbent LEC may not offer. Access Charge Reform, First Report and Order, Dkt. 96-262 (rel. May 16, 1997) at ¶ 340.

The Eighth Circuit's ruling on this point was unchanged by its recent order on rehearing, issued October 14, 1997. In that order, the Eighth Circuit ruled that the incumbent LEC is not

required to provide network elements on a combined basis. But that does not affect the Eighth Circuit's previous ruling that where the CLEC combines network elements in any manner, it is entitled to pay the cost-based rate rather than the wholesale rate.

2. BellSouth argues that the rate structure for unbundled network elements is a pricing issue, within the exclusive jurisdiction of the State Commission. On this basis, it argues that the FCC may not interfere with the PSC's decision to price unbundled network elements according to the wholesale rules. BellSouth Brief at 39-40. That argument is wrong, on two grounds.

First, the FCC has jurisdiction to assess applications for interLATA authority under section 271 to determine whether they comply with the statutory checklist. One of the checklist requirements is nondiscriminatory access to unbundled network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 1996 Act, § 271(c)(2)(B)(ii). Sections 251(c)(3) and 252(d)(1) require cost-based rates for network elements, even when combined by the CLEC to provide telecommunications service. The PSC and BellSouth do not even purport to be requiring cost-based rates for such network elements. There has been no finding -- either by this Commission or by the PSC -- that the rates BellSouth proposes to charge for combined network elements are "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Accordingly, in this situation, regardless of who would have jurisdiction to make such a finding, there has been no finding on the basis of which the Commission can conclude that BellSouth is providing access to network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."

This is not a case in which the Commission is called upon to interpret what the requirement of cost-based rates means -- for example, whether "cost" means TELRIC or some other measure. All the Commission must do in this case is to recognize that BellSouth is proposing to charge rates for UNE access in accordance with the resale pricing provisions rather than the network element pricing provisions of the Act. The competitive checklist requires BellSouth to provide access to unbundled network elements in accordance with the network element pricing provisions of the Act. Thus BellSouth is violating the checklist, and the application must be denied on that ground.

Second, State Commissions may not use their jurisdiction over pricing as a means of nullifying determinations the FCC has exclusive jurisdiction to make. As the Eighth Circuit recognized, Section 251(d)(2) of the Act gives the FCC exclusive jurisdiction to "determin[e] what network elements should be made available . . . ." [12] The Commission has exercised that jurisdiction to determine that network elements must be made available in a manner that allows requesting carriers to combine such elements to provide a telecommunications service. 47 C.F.R. § 51.315(a). The Eighth Circuit upheld that determination, rejecting the ILECs' argument that it would enable competing carriers to subvert wholesale pricing. Iowa Utilities Board, supra, 120 F.3d at 814-15. The PSC's decision would completely nullify the decisions of the FCC and the Eighth Circuit.

The effect of the position taken by BellSouth and the South Carolina PSC is that in order

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[12] The Eighth Circuit specifically stated that "section 251(d)(2) (unbundled network elements)" was one of "the areas in section 251 where Congress expressly called for the FCC's [rulemaking] involvement." Iowa Utilities Board, supra, 120 F.3d at 794 and n.10.

to obtain cost-based rates for unbundled network elements, the competing carrier must first combine those elements with its own facilities. However, as the Commission recently pointed out, "section 251(c)(3) does not require a new entrant to construct local exchange facilities before it can use unbundled network elements to provide a telecommunications service." Ameritech Michigan Order ¶ 333. Indeed, the Commission concluded, "such limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition." Id.

A State agency may not utilize a decision otherwise within its exclusive jurisdiction to second-guess or undermine a decision made by a federal agency within its area of exclusive jurisdiction. For example, the Supreme Court has held that a State court may not impose damages on a railroad for abandoning a line, where the abandonment was approved by the Interstate Commerce Commission; the State decision was unlawful because it "impose[d] sanctions upon a regulated carrier for doing that which only the [federal] Commission, acting pursuant to the will of Congress, has the power to declare unlawful." Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311, 324 (1981). Where the State decision is "necessarily supported by an assumption" that the federal decision is wrong, then the State commission or court "has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 580-82 (1981). The Supreme Court has applied these decisions specifically to the area of retail rate-making by State utility commissions, holding that State commissions may not

utilize their authority over retail rates to second-guess or undermine decisions made by the federal rate-making authority.[13]

By requiring carriers who furnish retail services with combined elements to pay wholesale rather than cost-based rates, the South Carolina PSC has "impose[d] sanctions upon a regulated carrier" for doing that which this Commission, "acting pursuant to the will of Congress," has specifically approved. Chicago & N.W. Transp. v. Kalo Brick & Tile, supra, 450 U.S. at 324. The PSC's decision is "necessarily supported by an assumption" that this Commission's decision was wrong. Arkansas Louisiana Gas Co. v. Hall, supra, 453 U.S. at 580. The PSC "has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." Id. at 581-2.

IV. BELLSOUTH HAS NOT DEMONSTRATED ELIGIBILITY FOR TRACK B.

In its SBC-Oklahoma Order,[14] the Commission established guidelines for determining when an RBOC must file an application under Track A, and when it may file under Track B. The Commission concluded that an RBOC may not file under Track B if a competing carrier has made a request for access and interconnection that "will lead to the type of telephone exchange

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[13] See Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (State commission may not set a retail power rate based on an allocation of low-cost and high-cost power purchased by power company different from allocation approved by Federal Energy Regulatory Commission in a wholesale rate proceeding); Mississippi Power & Light Co. v. Mississippi Ex rel. Moore, 487 U.S. 354 (1988) (State commission may not set retail power rate on basis of a finding that power company's wholesale purchase approved by Federal Energy Regulatory Commission was not prudent)

[14] Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Oklahoma, 12 FCC Rcd 8685 (re. June 26, 1997) ("SBC-Oklahoma Order").

service described in [Track A]." SBC-Oklahoma Order ¶ 56.

BellSouth apparently acknowledges that ITC DeltaCom -- which has fiber-optic networks in South Carolina and an SCPSC-approved interconnection agreement -- has taken recent steps toward providing residential service. BellSouth Brief at 14, 15-16. However, it argues that these steps must be ignored by the Commission, because they were taken after 3 months preceding the date of BellSouth's application. BellSouth Brief at 10-11.

The statute does not support BellSouth's argument. Track B is unavailable if a request is made by a qualifying provider prior to 3 months before the RBOC's application. 47 U.S.C. § 271(1)(B). Under SBC-Oklahoma, the request must be one which "will lead" to residential service by a facilities-based provider. Order ¶ 56. ITC DeltaCom's request was filed before June 30, 1997 (the 3-month cutoff date). In order to determine whether such a request "will lead" to residential service, the Commission must make a "difficult predictive judgment." Id. In making that judgment, there is no reason why the Commission cannot consider all the available evidence -- including events after June 30 as well as events before June 30.

We understand that ITC DeltaCom will be submitting evidence, which the Commission must consider in making a final determination regarding BellSouth's claimed eligibility for Track B status. If that evidence shows that ITC DeltaCom is presently moving towards provision of residential service in a reasonable manner, then the Commission must consider that evidence and rule that Track B is unavailable.